

70062-6

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

NO. 70062-6

MELANIE S. KELLER, an unmarried woman,

Appellant,

v.

PROVIDENT FUNDING ASSOCIATES, LP; a California Corporation;
REGIONAL TRUSTEE SERVICES CORPORATION; a Washington
Corporation; ROBINSON TAIT, P.S. a Seattle Law Firm; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS (MERS), a Virginia
Corporation; NICOLAS DALUIO, a Robinson Tait Attorney and
Resident of the State of Washington; and JOSEPH TAMI, a Resident of
the State of Pennsylvania

Respondents.

BRIEF OF RESPONDENTS

APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Suzanne Parisien

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KING COUNTY

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BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal concerns a non-judicial trustee's sale held on September 28, 2012, following Appellant Melanie Keller's (hereinafter "Borrower") default on her loan obligations in July 2011. The key facts are largely undisputed. Provident Funding Associates, LP made a loan to borrower on October 9, 2007 that was secured by a deed of trust recorded against the property located at 30476 154th Place SE, Kent, WA (the "subject property"). Borrower stopped making her mortgage payments and her loan went into default.

In Washington, a trustee may usually foreclose on a deed of trust, pursuant to the power of sale clause, if the borrower defaults on repaying the underlying obligation and sell the property without judicial supervision. Pursuant to the Washington Deed of Trust Act ("DTA"), the trustee shall issue certain notices concerning the default and trustee's sale, allowing the borrower an opportunity to cure as well as restrain the sale.

Regional Trustee Services Corporation ("Regional") served as the trustee in the underlying non-judicial action. Borrower does not dispute her default or challenge the underlying foreclosure notices. Rather Borrower's sole issue, though phrased in several different ways in her brief, is that Provident was not the proper party to appoint Regional and to initiate the foreclosure. Borrower does not assign any error relating to any

of the named Respondents except Provident and Regional. *Opening Brief*
pg 8-9.

The DTA and recent case law interpreting the language contained therein with respect to the definition of beneficiary reveal that Borrower's argument rests on a fundamental misinterpretation of the DTA, the *Bain* case, and the effect of the UCC's provisions governing negotiable instruments. As established in the record before the trial court, Provident was in possession of a Note payable to bearer throughout the entire foreclosure. As the Note Holder, Provident was entitled to enforce the security instrument.

In order to avoid the consequences of failing to satisfy her loan obligations, and then subsequently failing to cure her default or restrain the sale, Borrower is asking this Court to adopt an unreasonably narrow and inappropriate interpretation of the term beneficiary. Specifically, Borrower wants this Court to declare that a beneficiary under Washington law must be both the owner and the holder of the Note. Nothing under Washington law and policy considerations, or the UCC provisions warrant adopting such a position. This Court of Appeals should affirm Judge Parisien's order granting Respondent's Motion for Summary Judgment.

II. ASSIGNMENT OF ERRORS

Respondents accept Judge's Parisien's order granting summary

judgment in this case and do not make any assignments of error.

III. STATEMENT OF THE CASE

On March 19, 2013, Melanie Keller (“Borrower”) filed a Notice of Appeals in the King County Superior Court. CP 75-81. The action was initiated in response to the Superior Court’s granting of Respondent’s Motion for Summary Judgment, finding that Borrower failed to raise a genuine issue of material fact as to her allegations of criminal profiteering, violation of RCW 19.86, and intentional infliction of emotional distress. CP 72-74. In her brief, Borrower does not challenge the trial court’s findings as to the criminal profiteering or intentional infliction of emotion distress. Borrower’s assignments of error all relate to the trial court’s finding that Provident was entitled to enforce the security interest and foreclose on subject property.

Borrower entered into a mortgage agreement (“Note”) with Provident on or about October 9, 2007. CP 2:8-9. The Note was secured by a Deed of Trust to the property located at 30476 154th Place SE, Kent, Washington. CP 2:8-9. The original lender on the Note and Deed of Trust is Provident Funding Associates, LP and Mortgage Electronic Registration Systems, Inc. as nominee for Provident Funding Associates, LP was identified as the original beneficiary of the Deed of Trust. CP 2:11-14. MERS subsequently assigned its interest in the deed of trust to Provident

as evidenced by the Assignment of Deed of Trust recorded on January 13, 2012 in the official records of King County. Ex. B; CP 29-31.

Borrower became delinquent on her loan for the July 2011 payment and failed to make payments thereafter. CP 2:15. Because Borrower failed to cure her default, the subject property went into foreclosure. CP 2:15-16. Provident, as the present beneficiary of record, appointed Regional as the successor trustee. Ex. C; CP 33-34. Prior to initiating the foreclosure, Regional obtained the Affidavit of Possession of Note from Provident stating that Provident was the holder of the Note in the amount of \$160,000 and is currently in possession of the Note. Ex. A; CP: 48-50. Regional was entitled to rely on the Affidavit of Possession of Note and proceeded with foreclosure accordingly. RP 5: 20-21.

Borrower attempted to stop the sale by filing a Motion for Temporary Restraining Order but her motion was denied by Commissioner Allred on September 27, 2012. CP 2: 23-25. The property went to sale on September 28, 2012. CP 54: 2.

Shortly thereafter, on October 15, 2012, Borrower brought another ex parte motion for a TRO to restrain enforcement of the sale before Judge Hollis Holman. CP 5: 9-10. Additional briefing and argument were submitted by Provident to the trial court to clarify the transferring and possession of the Note. CP 5: 11-15. The judge denied the TRO for

plaintiff's failure to follow the ex parte rules. CP 5: 15-17.

Respondents subsequently moved for summary judgment. In its briefing, Respondents explained how the Note was purchased by Freddie Mac after origination, and endorsed in blank by Provident. CP 4: 1. Pursuant to Freddie Mac guidelines, Provident remained as servicer, and as servicer was given authority to proceed with the foreclosure in Provident's name. CP 4: 9-13. Consequently, once the loan was to go into foreclosure, the Deed of Trust was assigned from MERS to Provident. CP 4: 2-4; 9-12. The Freddie Mac guidelines further provided that prior to instituting the foreclosure, the Note is received by the servicer from the custodian depository. CP 4: 14-16. In furtherance of those guidelines, and prior to instituting the foreclosure, Provident received the original note from the custodian depository and was in actual physical possession of the original note until Provident sent the original note to its counsel for purposes of the summary judgment hearing. RP 3: 12-15; CP 4: 14-18.

The trial court after reviewing everything from both parties as well as the case law, including the *Bain* decision and the RCWs, found that Provident was the actual holder of the Note and also the beneficiary under RCW 61.24.005. RP 16: 10-17. Borrower now appeals that finding. CP 482-483; 484-492.

IV. ARGUMENT

A. Summary of Argument

Provident properly foreclosed on the subject property on two separate grounds. First, Provident was the actual holder of the Note. CP 25. The record before this Court clearly establishes this to be the case. Specifically, the Affidavit from Provident was signed under the penalty of perjury while the original Note was physically before the signing party. CP 25. Moreover, Provident provided its counsel with the original Note, and counsel in turn made the original Note available for hearing at the motion for summary judgment. RP 3: 12-16.

Provident was also the beneficiary of the Deed of Trust by operation of law pursuant to RCW 61.24.005(2), which defines beneficiary as the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation. While the Note was purchased by Freddie Mac after loan origination, it was endorsed in blank by Provident, thereby becoming bearer paper. CP 4: 1-3. Prior to instituting foreclosure, Provident held the Note for Freddie Mac as its servicer and had authority to proceed with the foreclosure. CP 4: 9-15. Accordingly, Provident was assigned the beneficial interest in the deed of trust. CP 4: 10-12.

Borrower presents five issues for review, all of which essentially arise from a single assignment of error – the trial court’s finding that Provident was the beneficiary and holder of the Note, and thus entitled to foreclose. The crux of borrower’s argument on appeal is that only an owner of the Note can foreclose under the Washington Deed of Trust Act. Borrower is mistaken. In reviewing the plain meaning of the definition of beneficiary in the DTA, the court’s interpretation of that definition in the *Bain* decision, the UCC, and the long standing objectives of the non-judicial foreclosure system, this Court should find that the trial court properly found that Provident was the holder of the Note and as beneficiary of the Deed of Trust under RCW 61.24.005 was entitled to enforce the security interest in a non-judicial foreclosure.

B. Standard of Review.

The standard of review with respect to both the trial court’s declaration that Provident was the beneficiary under RCW 61.24.005 and holder of the Note as provided in RCW 62A.3-301 is de novo, because each is a question of law. Questions of law are reviewed de novo.

Hanson v. City of Snohomish, 121 Wn.2d 552, 556, 852 P. 2d 295 (1993).

Interpretations of law are similarly reviewed de novo. *Neighborhood*

Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 715, 261

P. 3d 119, 125 (2011). Grants of summary judgment are reviewed de

novo, and the Court of Appeals engages in the same inquiry as the trial court. *Id.*

C. Provident Was Authorized To Foreclose

The facts pertinent to Provident's authority to foreclose are largely uncontested. Instead, it is the interpretations of the relevant statutes at the heart of the controversy and subject to review by this Court. It is undisputed that borrower entered into a loan agreement ("Note") with Provident and promised to repay the debt but defaulted on this promise. *Opening Brief* pg 10. It is also undisputed that Provident sold the Note to Freddie Mac, as authorized to do so per the Note's terms, and that the Note was endorsed in blank. *Opening Brief* pg 10. Provident retained servicing rights, which included the authority to foreclose on defaulting loans. CP 4: 9-12. Pursuant to Freddie Mac guidelines and prior to instituting the foreclosure, the Note was received by Provident from the Custodian Depository, and Provident retained possession of the original note. CP 4: 14-16. This is consistent both with the signed sworn Affidavit of the individual that personally retained the original Note, Joseph Tami, and with counsel's presentation of the original Note in court. CP 4: 16-18; RP 3: 12-16. Borrower's position, on the other hand, is not supported by evidence in the record or existing Washington law.

1. Provident was the beneficiary as defined in RCW 61.24.005 at the time of the foreclosure.

The Supreme Court of Washington has recently held that the true beneficiary is the holder of the underlying promissory note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P. 3d 34, 36-37 (2012). The Court in reaching this conclusion noted that other portions of the deed of trust act bolster the conclusion that the legislature meant to define “beneficiary” to mean the actual holder of the promissory note or other debt instrument; specifically, RCW 61.24.070 in reference to credit bids and the foreclosure fairness act. *Id* at 101-102, 42-43. The definition of beneficiary is defined in RCW 61.24.005 as follows:

(2) "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

Consequently, *Bain* approves of foreclosures in cases where the note holder is the party seeking to enforce the security instrument and foreclose. *Id.* at 104; 44. Even if the assignment from MERS to Provident was not operative, that is irrelevant, because Provident held the Note. *Bain* concluded “if the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of

transactions. Having MERS convey its “interests” would not accomplish this.” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 111, 285 P.3d 34, 47-48 (Wash. 2012). The court is effectively saying that whether there is a MERS assignment in the chain of title would be irrelevant, as the entity of the note holder would establish the identity of the beneficiary. Thus, as a matter of law, Provident’s authority to foreclose derived from its status as the holder of the Note.

Borrower’s contention that Provident is not the beneficiary and entitled to foreclose stems from her fundamental misunderstanding of the definition of beneficiary. Borrower liberally substitutes the terms holder found in RCW 61.24.005 with the term owner. The term holder and owner, however, are not synonymous. Moreover, Borrower provides no basis for her position that the beneficiary must be both the owner of the debt and holder in order to foreclose under the DTA. The Washington Supreme Court, however, has provided guidance on this issue in *Bain*. Specifically, the Supreme Court found that a beneficiary must either actually possess the promissory note **OR** be the payee. *Id.* at 104; 44 (added emphasis). The Court in reaching this conclusion both examined the statutory definition of the term beneficiary itself and also followed the UCC provisions for the statutory meaning of the term holder. *Id.* at 99-103; 39-43. Thus, because Provident held the Note, and had authority to

foreclose, as the servicer, pursuant to Freddie Mac's guidelines, the foreclosure was proper.

2. Provident was holder of the Note under the UCC.

A note is a negotiable instrument under the UCC, meaning a person can transfer or negotiate a note to another person by indorsing it in blank and delivering it to another person. *See* RCW 62A.3-104(a), (b) & (e); RCW 62A.3-205(b). Once the note is transferred, the transferee becomes the "holder" and is entitled to enforce it against a defaulting borrower. *See* RCW 62A.1-201(b)(21)(A). The UCC defines holder with respect to a negotiable instrument as, in part: "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201; RCW 62A.3-301. An instrument payable to an identified person may become payable to bearer if it is *indorsed in blank* pursuant to RCW 62A.3-205(b)." (emphasis added).

A person entitled to RCW 62A.3-301 to enforce an instrument means:

(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner

of the instrument or is in wrongful possession of the instrument.

The transferee holder is not only entitled to enforce the note but also the underlying deed of trust. See RCW 62A.9A-203(g); RCW 62A.9A-601. Upon possession of the note, the transferee holder, therefore, has the right to foreclose on the note and deed of trust. *Zalac v. CTX Mortg. Corp.*, 2013 U.S. Dist. LEXIS 20269 (2013).

Here, Freddie Mac is the owner of the instrument, the Note, which is endorsed in blank, thus becoming bearer paper, and Provident is the “holder of the instrument” having “possession of the instrument.” CP 4: 1-3; 4: 16-18. The *Bain* court’s discussion and findings substantiates the correctness of this UCC analysis. *Bain*, 175 Wn 2d at 104; 285 P. 3d at 44. Specifically, the *Bain* Court agreed that the interpretation of the WDTA should be guided by these UCC definitions, and thus held that a beneficiary must either actually possess the promissory note or be the payee. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P3d 34, 44 (2012). The *Bain Court* further observed that this approach accords with the way the term “holder” is used across the deed of trust act and the Washington UCC. *Id.* Because the undisputed facts establish that Provident held the subject Note at the time of foreclosure, there is no merit to Borrower’s claims.

Borrower even conceded that Provident was in possession of the Note and was the holder of the Note. RP 8: 18-19. Despite the admission and the evidence before this Court, Borrower argues that Provident is not the holder under the UCC definition because it did not have legal possession of the Note during the foreclosure process. Nothing in the UCC or Washington real property law, for that matter, imposes a legal possession requirement. Instead what matters is physical possession of the negotiable instrument. RCW 62A.1-201. The legal authority and Freddie Mac guidelines cited by Borrower do not support the adopting of a legal possession requirement. Absent further clarification from Borrower, Respondents take borrower's usage of the term legal possession to mean owner of the Note. Borrower in essence is making the same argument under the UCC as she is under the RCW's definition of beneficiary – that to be a beneficiary, one must be both the owner and the holder. Such an interpretation is not recognized by any legal authority, as explained in further detail below.

Borrower also incorrectly declares that the only examples of non-owner note holder are thieves and people who find lost notes. *Opening Brief* pg 20-21. Borrower further mischaracterizes the UCC as having two groups of note holders – (1) note holders who own the debt, and (2) note holders who do not own the debt. Borrower continues with a faulty line of

reasoning in concluding that the beneficiary must always be the owner of the Note to foreclose non-judicially in Washington. There are several problems with Borrower's theory – most notably, the UCC specifically carves out a definition for simply a holder of the instrument. RCW 62A.3-301. Moreover, a person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d at 104, 285 P. 3d at 44. A Washington district court case followed this rule in finding that Chase, the servicer, as a matter of law was the holder, as a matter of law, by way of its being in physical possession of the note which was endorsed in blank even though Fannie Mae was the owner. *Zalac v. CTX Mortg. Corp.*, 2013 U.S. Dist. LEXIS 20269, 8-9 (W.D. Wash. Feb. 14, 2013).

Another provision of the UCC addresses the rights of a non-owner holder. Specifically, those rights are defined in RCW 62A.3-203(b), which provides as follows:

Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

Subsection (a) defines transfer by limiting it to cases in which possession of the instrument is delivered for the purpose of giving to the person receiving delivery the right to enforce the instrument. RCW 62A.3-203(a). The Official Comments of this provision emphasize that it is the delivery of the note that establishes the right of the transferee to enforce it. RCW 62A.3-203. The statute specifically contemplates transferring possession of the instrument without transferring ownership rights by utilizing the language “whether or not the transfer is a negotiation” – if it is a transfer without negotiation, it is a transfer without ownership rights. RCW 62A.3-203(b).

Of particular importance, based on the issue before this Court, is the Official Comment that explains the right to enforce an instrument and ownership of the instrument are two different concepts. The example used is that of a thief who steals a check payable to bearer thereby becoming the holder of the check and a person entitled to enforce it, but not the owner of the check. The official comment goes on to state that, if the thief transfers the check to a purchaser, the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. RCW 62A.3-203.

Also, according to the official comments, “an instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.”” RCW 62A.3-203. It is apparent that the purpose is to promote a free market for instruments except where fraud or illegality is present. *Federal Fin. Co. v. Gerard*, 90 Wn. App. 169, 177 (Wash. Ct. App. 1998). This exception does not apply to the present case. Here, we do not have the case of a thief or non-owner holder without right to enforcement. Rather, Provident, pursuant to Freddie Mac guidelines, received the Note endorsed in blank from the Custodian Depository prior to instituting the foreclosure action. CP 4: 1-3; 14-16. Also, in furtherance of Freddie Mac guidelines, Provident remained as servicer and was given authority to proceed with the foreclosure. CP 4: 9-12. Thus, Provident was a non-owner holder with the right to enforcement, which is consistent with the UCC and Washington law applying the UCC.

D. Washington law does not provide that the owner and holder of the Note must be the same person.

Borrower argues that the beneficiary under Washington law must be both the “Holder” and “Owner” of the Note. This argument ignores

both the plain language of the statute and relevant case law. Borrower is asking this Court to ignore the basic principles of statutory construction. Statutory interpretation begins with the statute's plain meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131, 134 (2010). The definition of beneficiary is defined in the WTA as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.050(3). Provident, as the holder of the Note, is a beneficiary under the plain meaning of RCW 61.24.050(3). The trial court properly held this to be the case.

Even if for the sake of argument we continued the inquiry and explored the definition of holder, Borrower's claim that the beneficiary must be both the owner and holder fail. The term holder is not defined in the WDTA. When a statutory term is undefined, the words of a statute are given their ordinary meaning. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P. 3d 1283, 1289 (2010). Holder is one who holds and entitled to enforce, and owner is one who owns. Borrower incorrectly asserts that the holder must both hold and own.

The term "holder" when used in connection with a promissory note or other negotiable instrument has a specific meaning. With respect to a negotiable instrument, holder means the person in possession if the instrument is bearer paper, or in the case of an instrument payable to an

identified person, if the identified person is in possession. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34, 44 (2012)(examining UCC provisions for definition of holder).

Generally, the intended meaning is also apparent from the surrounding context. *Id.* Consequently, we look to the context of the other provisions of the WDTA, and the other provisions in the Act provide guidance on this term. Specifically, RCW 61.24.030(7)(a) provides that one of the requirements for a trustee's sale is a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the **actual holder** of the promissory note or other obligation secured by the deed of trust. RCW 61.24.030(7)(a). Thus, for purposes of foreclosing non-judicially, there is no requirement that the trustee obtain a declaration from the beneficiary stating that that the beneficiary also owns the note. RCW 61.24.030(7)(a) declares that the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. RCW 61.24.030(7)(a). This provision, however, also sets forth how the trustee must obtain a declaration stating that the beneficiary is the actual holder of the promissory note. *Id.* The inconsistency resulting from the utilization of the term "owner" in RCW 61.24.030(7)(a) when the DTA utilizes the term "holder" to define the beneficiary does not warrant adopting Borrower's

position that the beneficiary must be both the owner and holder of the Note. Statutes should be construed in a manner to give effect to all the language in them. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P. 3d 1283, 1289 (2010). When RCW 61.24.030(7)(a) is read in conjunction with the definition of beneficiary, it is clear that under Washington law, a person entitled to enforce the security interest in a non-judicial foreclosure is the holder of the promissory note. If a statute's meaning is plain on its face, the court must give effect to the plain meaning as an expression of legislative intent. *Dowler v. Clover Park Sch. Dist.* No 400, 172 Wn. 2d 471, 258 P.3d 676, 680 (Wash. 2011).

In determining the meaning of statutory terms, the courts also look to related statutes. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn 2d 83, 103, 285 P.3d 34, 44 (2012). In the context of the definition of holder, the UCC provisions provide substantial guidance. "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34, 44 (Wash. 2012). "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession. *Id.* Under Washington law an instrument endorsed in blank becomes

payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of a negotiable instrument is the person in possession and is entitled to enforce it. RCW 62A.3-301; 62A.1-201(20). *Zalac v. CTX Mortg. Corp.*, 2013 U.S. Dist. LEXIS 20269 (D. Wash. 2013). Because the Note is endorsed in blank, the Note is payable to bearer – person who has actual possession of the Note. RP 3: 17-25. Because Provident was in possession of the Note during the foreclosure, as established by the Affidavit of Possession, Affidavit of Tami, and Note presentment at the motion for summary judgment hearing, Provident was the holder of the Note and entitled to foreclose. RP 5: 23-25; 6: 1-2.

Several Washington cases, besides *Bain*, support the definition of beneficiary to mean the holder of the instrument or document evidencing the obligations secured by the deed of trust opposed to owner and holder. *Ukpoma v. United States Bank Nat'l Ass'n*, 2013 U.S. Dist. LEXIS 66576, 8-9 (D. Wash. 2013)(finding that U.S. Bank by virtue of being in possession of the note, which was endorsed in blank, was entitled to foreclose). Furthermore, the Courts in this district have widely held that there is no requirement that the foreclosing party show the borrower the original note. *Petree v. Chase Bank*, 2012 U.S. Dist. LEXIS 173409 (W.D. Wash. Dec. 6, 2012). This precedent supports the fact that the court's inquiry in determining who is the proper party to foreclose is

focused on the entity that holds the Note opposed to ownership of the Note. *Abram v. Wachovia Mortg.*, 2013 U.S. Dist. LEXIS 61800, 9-10 (D. Wash. 2013).

In summary, the Borrower's assertion that the Washington Supreme Court agrees that the beneficiary must be both the owner and holder is entirely without merit. *Opening Brief*, pg. 34. Borrower has not cited a single case or line of authority in Washington, nor can she, that supports her position. Washington law, both statutory and case law, establish that a beneficiary must hold the note in order to foreclose non-judicially. The *Bain* case interpreted a beneficiary to be a holder if they either actually possess the promissory note or are the payee. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d at 104, 285 P. 3d at 44. The Supreme Court, constrained by an incomplete record, limited its holding to finding that the beneficiary must hold the note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d at 120, 285 P. 3d at 52. In the present case, the record before this Court demonstrates that Freddie Mac gave Provident the authority to proceed with the foreclosure in the servicer's name and that Provident received the original Note per Freddie Mac guidelines, and there is nothing in the DTA preventing this relationship. CP 4: 9-12; 14-17. The subject Note is indorsed in blank, and Provident was in possession of the Note during all times relevant to this action. CP 4:1-2; CP 4: 16-20.

There is no reason to presume that the DTA requires that the beneficiary be both the owner and holder, as this interpretation requires ignoring the plain language in RCW 61.24.005(2) and relevant Washington case law interpreting the definition of beneficiary under the WDTA.

E. Regional obtained the requisite proof under RCW 61.24.030(7)(a)

Borrower claims that Regional violated the WDTA because it was required to have proof of the “owner” of the Note. RCW 61.24.030(7)(a) states:

That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. **A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.** [Emphasis added].

Regional obtained the Affidavit of Note Holder stating that Provident was the Note Holder and in possession of the Note. RP 5: 21-23. The Affidavit of Possession of Note is dated March 13, 2012 and specifically states that “Provident Funding Associates, L.P. is the holder of the promissory note made on 10/9/2007 by Melanie Keller in the amount of \$160,000.00. Provident Funding Associates, L.P is currently in possession

of this promissory note.” CP 48-50. The Affidavit of Possession is signed under the penalty of perjury. *Id.*

The WDTA expressly provides that Regional is entitled to rely on the Affidavit of Note Holder. RCW 61.24.030(7)(b). Having proof that Provident was the Note Holder satisfied the concerns of RCW 61.24.030(7)(a) and the definition of beneficiary as provided in the WDTA. Washington courts have largely rejected any efforts to impose additional proof requirements upon the trustee. *See Bavand v. OneWest Bank FSB*, 2013 U.S. Dist. LEXIS 41745 (D. Wash. 2013) (referencing *Petree v. Chase Bank*, No. 12-CV-5548-RBL, 2012 U.S. Dist. LEXIS 173409, 2012 WL 6061219, at *2 (W.D. Wash. Dec. 6, 2012) (“Courts of this district routinely reject these claims.”). For example, one district court reiterated that there is no requirement that a beneficiary show the borrower the actual note, and also remarked that there are probably many ways to satisfy the requirement the beneficiary proof requirement. *Elene-Arp v. Fed. Home Fin. Agency*, 2013 U.S. Dist. LEXIS 65358 (D. Wash. 2013). This same Court concluded, however, that RCW 61.24.030(7)(a) establishes one specific way – a declaration by the beneficiary made under penalty of perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection. RCW 61.24.030(7)(a). *Bain* also

highlights the need for the trustee to confirm that the beneficiary holds the Note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 100, 285 P.3d 34, 39 (2012).

Because Regional obtained the Affidavit of Possession, which stated that Provident was the holder of the promissory note and currently in possession, Regional complied with RCW 61.24.030(7)(a) and did not violate its good faith obligations under RCW 61.24.010(4). Regional precisely followed the letter of the law by obtaining a declaration stating that the beneficiary is the actual holder. Borrower acknowledges that this declaration was in fact provided to Regional by Provident. *Opening Brief*, Pg. 30. Yet, Borrower takes issue with the fact that the declaration does not state that Freddie Mac owns the Note. The declaration specifically requires the beneficiary to state that they are the actual holder and not the owner. And this reading is consistent with the definition of beneficiary in RCW 61.24.005(2).

C. CONCLUSION

The trial court did not err when it concluded that Borrower failed to raise a genuine issue of material fact as to her causes of action for criminal profiteering, Violation of RCW 19.86, and Intentional Infliction of Emotional Distress. Further, the trial court correctly found that Provident was the holder of the Note as defined in RCW 62A.3-301 and as

beneficiary under RCW 61.24.005, was entitled to enforce the security interest in a non-judicial foreclosure. Respondents respectfully requests that this Court upholds the trial court's Order as to Provident's authority to foreclose in the underlying non-judicial foreclosure action.

Dated this 31st day of July, 2013.



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DECLARATION OF SERVICE

I certify that on this 31st day of July, 2013, I personally delivered a true and correct copy of the foregoing Brief of Respondents, PROVIDENT FUNDING ASSOCIATES, LP; a California Corporation; REGIONAL TRUSTEE SERVICES CORPORATION; a Washington Corporation; ROBINSON TAIT, P.S. a Seattle Law Firm; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS), a Virginia Corporation; NICOLAS DALUIISO, a Robinson Tait Attorney and Resident of the State of Washington; and JOSEPH TAMI, a Resident of the State of Pennsylvania, together with the Appendix thereto, to the Following party at the following address:

**Melanie S. Keller,
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Kent, WA 98042
(253) 221-0190**

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington, on July 31, 2013.



Andrei Teretchenko

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STATE OF WASHINGTON